

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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In the Matter of:

Application of Section 73.606(b),  
Table of Allotments, Television  
Broadcast Stations and Section 73.622(b),  
Table of Allotments, Digital Television  
Broadcast Stations (Buffalo, New York)

MM Docket No. 98-75  
RM-9364

98-175

TO THE COMMISSION

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**PETITION FOR EMERGENCY RELIEF**

The Coalition for Noncommercial Media ("CNM"), by counsel, respectfully petitions for emergency relief to prevent the imminent elimination of two-channel noncommercial television service in Buffalo, New York.<sup>1/</sup>

Channel 23\*, occupied by WNEQ-TV, is the only channel reserved for noncommercial TV operation in Buffalo. The licensee, Western New York Public Broadcasting Association ("WNYPBA"), operates WNEQ-TV. WNYPBA and also operates WNED-TV on nonreserved Channel 17. WNED-TV has a superior signal and carries traditional PBS affiliate fare, while WNEQ-TV has served the area's needs for educational and alternative noncommercial programming.

On September 25, 1998, at WNYPBA's request, the Commission issued a Notice of Proposed Rulemaking proposing to assign Channel 17 a noncommercial reservation and to "dereserve" the noncommercial status for Channel 23\*. NPRM, 13 FCC Rcd 18803 (1998). The only purpose of this unprecedented swap of channel designations was to permit WNYPBA to sell WNEQ-TV to a commercial operator.

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<sup>1/</sup> The Commission has the flexibility to grant this Petition under any of several provisions in its rules, including 47 CFR §1.1, §1.2, §1.102(b)(3) and §1.115(h)(2). Owing to the unexpected and dramatic new development described herein, CNM requests acceptance of this Petition after the pleading cycle has ended.

Several parties, including CNM, opposed the dereservation of Channel 23. CNM contended that Commission policy had always favored multiple channel public TV service, that Buffalo viewers should not be deprived of a second public television station merely in order to create an eighth (American) commercial station, that WNYPBA was not in financial distress and thus did not need a huge (\$33 million) infusion of cash, and that WNYPBA had not begun to exhaust far less drastic means of raising cash, such as attempting to sell WNEQ-TV to another public broadcaster.<sup>2/</sup> CNM also counterproposed that both Channels 17 and 23\* should be reserved.

In Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations and Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Buffalo, New York) (Report and Order), DA 99-1442 (Chief, Allocations Branch, released July 23, 1999) ("R&Q"), the Bureau ruled in a footnote, without explanation, that CNM's proposal was not a counterproposal. Id. at 1 n. 2. Consequently, the Bureau evidently did not consider whether WNYPBA's plan was superior to CNM's proposal, but only whether it would serve the public interest. The Bureau found that it would.

On August 23, 1999, CNM timely filed an Application for Review of the R&Q. WNYPBA filed an Opposition to the Application for Review and CNM has filed a reply to WNYPBA's Opposition.

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<sup>2/</sup> See Deletion of Noncommercial Reservation of Channel \*16, 482-488 MHz, Pittsburgh, Pennsylvania (MO&O), 11 FCC Rcd 11700 (1996) ("Pittsburgh") in which the Commission refused to reserve a public TV allotment in large part because the sale of one of the stations to another noncommercial operator was possible. Indeed, such a sale was openly contemplated as an alternative by the licensee. Id. at 11710 ¶22.

On November 15, 1999, Communications Daily reported that the company that had contracted with WNYPBA to purchase WNEQ-TV had terminated that contract. Communications Daily's story also reported that because the Commission now allows commercial duopolies, "'whoever buys it can go on the air'" immediately initially under local marketing agreement", according to WNYPBA's President, Don Boswell.<sup>3/</sup>

What WNYPBA contemplates is both ironic and breathtaking: it openly intends to misuse the disfavored vehicle of a TV LMA for the purpose of circumventing the Commission's ability to determine, in the first instance, whether national communications policy still stands for the preservation of two-channel public broadcasting.<sup>4/</sup>

The Commission is all too familiar with what happens when broadcasters use LMAs to establish industry structure rather than waiting for the Commission to articulate communications policy. In the early 1990s, commercial broadcasters created scores of LMAs as ad hoc duopolies, leaving the Commission with only two public policy choices: force divestitures, or allow LMAs to be converted into duopolies outright. The first option was impractical because it would have upset the entrenched businesses of incumbent broadcasters; the second choice was unfortunate because it undermined diversity. Now WNYPBA wants to repeat this same pattern of regulation in which private companies arrogate to themselves the ability to set national communications policy, leaving the

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<sup>3/</sup> Communications Daily, November 15, 1999, p. 10.

<sup>4/</sup> This issue is not unique to Buffalo. There are evidently fifteen markets -- most quite large -- with two public television stations, one of which operates on a nonreserved channel. See CNM Application for Review at 3 n. 1.

Commission little choice later but to ratify and validate the unfortunate outcome.

Just three months ago, the Commission put an end to the use of LMAs by those who enjoyed the economic fruits of duopoly without the licensee responsibilities of duopoly.<sup>5/</sup> Yet now, the prospect of a diversity-killing LMA again faces the Commission directly. WNYPBA has essentially declared it intends to preempt the FCC entirely by using an LMA to put an end to two-channel public television in Buffalo.

Communications policy should be made by the Federal Communications Commission, not by the opportunistic deeds of private parties. By acting now, the Commission can reserve to itself the initial choice to say what the law is. A clear instruction to WNYPBA to preserve the status quo ante is particularly appropriate in light of the clear and unequivocal precedent favoring two-channel public TV service -- a precedent WNYPBA wants to overturn by default.<sup>6/</sup> The emergency relief sought

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<sup>5/</sup> Review of the Commission's Regulations Governing Television Broadcasting, MM Docket Nos. 91-221 and 87-8 (Report and Order), FCC 99-209 (released August 6, 1999).

<sup>6/</sup> In Pittsburgh, 13 FCC Rcd at 11707 ¶6, the Commission expressed its support for two-channel public broadcasting in emphatic and resounding terms:

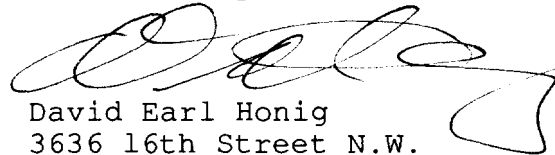
[T]he deletion of the reservation of an operating noncommercial educational television station so that it may be sold to a commercial operator [] is not only unprecedented, but is also inconsistent with the Commission's stated goal over the past four decades, of promoting the growth of public television and the broadcast of educational programming.

The Commission observed that a second public television's programming "cannot be fully replaced simply by extending the hours of operation" of the primary station. Id. at 11710 ¶21.

in this Petition is an appropriate way to prevent the preemption of Commission policymaking and the destruction of a longstanding precedent that protects diversity.

The Commission should prohibit WNYPBA from taking any steps to convert WNEQ-TV (or WNED-TV) to commercial operation until the Commission has had a fair opportunity to determine whether to grant CNM's proposal to reserve Channel 17 and retain the reservation for Channel 23\*, or whether to leave the Buffalo TV allotments unchanged but nonetheless reverse the R&Q's deservation of Channel 23\*.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Honig", is written over the typed name and address.

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for Noncommerical Media

November 26, 1999

CERTIFICATE OF SERVICE


I, David Honig, hereby certify that I have this 26th day of November, 1999 caused the foregoing "Petition for Emergency Relief" to be delivered by U.S. First Class Mail, postage prepaid, to the following:

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